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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-470

PHYLLIS B. HETRICK,

*Petitioner,*

—v.—

ROBERT R. MARTIN, President of Eastern Kentucky University, and the BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 15, 1973.

### Citation to Opinion Below

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix, *infra,* p. 1a. The Findings of Fact and Conclusions of Law, Memorandum Opinion, and opinion denying defendants' motion to dismiss of the District Court are set out in the Appendix, *infra,* pp. 11a, 17a and 21a respectively.

### Jurisdiction

The judgment of the Court of Appeals was entered on June 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(1).

## Constitutional Provisions Involved

*United States Constitution, Amendment I*

"Congress shall pass no law . . . abridging freedom of speech . . . "

*United States Constitution, Amendment XIV*

" . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . . "

## Question Presented

Whether a public university may, consistent with the First and Fourteenth Amendments, refuse to renew the contract of a non-tenured faculty member on the ground that the faculty member's teaching methods and educational philosophy do not conform with those approved by the governing officials of the University?

## Statement of the Case

The petitioner, Dr. Phyllis B. Hetrick, filed suit in the United States District Court for the Eastern District of Kentucky on August 12, 1970, against the President and Board of Regents of Eastern Kentucky University, charging that the failure of the University officials to renew her appointment for the 1970-71 academic year was violative of her constitutional rights. In particular, she asserted that her First and Fourteenth Amendment rights had been violated by her termination without a hearing or written statement of reasons, on an arbitrary basis, for making in-class statements about the war and the draft and because

of her beliefs and ideas. The District Court rejected the claim that she was entitled to a hearing or written statement of reasons, and the trial before the Court was limited to the question whether the petitioner had been terminated for conduct on her part that was protected by the First Amendment. The District Court held that the termination of the petitioner's employment was not violative of her First Amendment rights, and its judgment was affirmed by the Court of Appeals.

The petitioner was appointed as a non-tenured Assistant Professor of English at Eastern Kentucky University for the 1969-70 academic year. The appointment was for a one year term and could be renewed thereafter. In the fall of 1969 the petitioner had occasion to discuss the Vietnam War and the draft in her English Composition classes. She also made a statement to the class that, "I am an unwed mother." (The petitioner was divorced and had two children.) A parent complained about these statements to Dr. Robert R. Martin, the President of the University, and Dr. Martin ordered an investigation. The investigation was initially conducted by Dr. Kelly Thurman, the Chairman of the Department of English, and was subsequently joined in by Dr. Frederick Ogden, the Dean of the College of Arts and Sciences. There was a conference between the petitioner and Dr. Thurman and a further conference between the petitioner, Dr. Thurman and Dr. Ogden. Dr. Ogden then made a written report to President Martin, which concluded with the statement, "Dr. Thurman and I have advised Miss Hetrick to be aware of the somewhat restrictive backgrounds of her freshman students and to confine her discussions more closely to the specific essays and other material assigned in the English Composition course." President Martin was not satisfied with this report, saying

that Dean Ogden had overlooked the "unwed mother" remark. Dr. Thurman then sent a letter to President Martin explaining the "unwed mother" remark as illustrating the "importance of the rich connotations that words have and of the necessity of singling out the novel meanings in order to give one's writing a particular flavor." President Martin still was not satisfied and sought a further explanation from Dean Ogden, who in turn informed President Martin that, "Dr. Thurman had cautioned her about making such statements to the generally unsophisticated students which we have."

In February, 1970, the petitioner was informed that her contract would not be renewed for the 1970-71 academic year. She was the only one of 11 new persons who had been added to the English Department during 1969-70 who was not offered a contract for the 1970-71 academic year, and the only one of approximately 40 new persons on probationary appointments in the College of Arts and Sciences for that year who was terminated by non-renewal. In the 1967-8 academic year 14 new persons were added to the English Department, none of whom was terminated by non-renewal, and in the 1968-9 academic year 10 persons were added to the Department, none of whom was terminated by non-renewal after the first year, although one was terminated after the second year.

The petitioner contended that her discussion about Vietnam and the draft in her English Composition class and her "unwed mother" remark, which resulted in the investigation described above, were the principal reasons why her contract was not renewed. Dr. Thurman and other University officials put forth other reasons for the non-renewal of the petitioner's contract. The District Court found that the reasons advanced by Dr. Thurman and the University

officials were "largely superficial" and that the alleged inadequacies on the part of the petitioner were "easily correctable."[1] But it also found that the petitioner had not sustained her burden of proving that the decision not to renew her contract was predicated upon her classroom discussion of the war and the draft and the "unwed mother" remark. Instead, as the Court stated:

> "The court finds from the tenor of the evidence that the non-renewal of Dr. Hetrick's contract was not based so much on those specific reasons [those advanced by Dr. Thurman and the other University officials], as it was on the feeling of Dr. Thurmond [sic] and the other faculty members of the English Department that Dr. Hetrick's teaching philosophy and the manner in which she implemented it were not adaptable to the achievement of the academic goals of the University. . . . (App., *infra*, p. 14a.)
>
> "It simply seems that Dr. Hetrick's teaching methods were too progressive or perhaps less orthodox than the other faculty members in her department felt were conducive to the achievement of the academic goals they espoused." (App., *infra*, p. 19a.)

The District Court concluded that the refusal to renew the petitioner's contract on this ground was constitutionally

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[1] For example, one of the purported reasons was that the petitioner had not yet obtained her Ph.D. degree, although she had said she would do so by the end of the first semester. However, on January 22, 1970, Dr. Thurman wrote to Dean Ogden that the petitioner expected to receive the degree in June, 1970, which she in fact did. More significantly, five other new members who had been added to the English Department during the 1969-70 academic year not only had not received their degrees by the end of that year, but had not received them by the time of the trial of the case in January, 1972, and were still on the faculty.

**permissible, and the Court of Appeals agreed with this conclusion.**

## REASONS FOR GRANTING THE WRIT

### I.

**The question whether a public university may, consistent with the First and Fourteenth Amendments, refuse to renew the contract of a non-tenured faculty member on the ground that the faculty member's teaching methods and educational philosophy do not conform with those approved by the governing officials of the University is clearly an important constitutional question which has not been but should be settled by this Court.**

Although this Court has dealt with numerous cases involving the academic freedom of teachers and students, it has never been, in the words of the Court of Appeals, "squarely presented with the question whether the administration of a public school may, consistent with the First Amendment, fail to renew a nontenured teacher because of displeasure with her 'pedagogical attitudes.'" (App., *infra*, p. 7a.) The cases involving claims of violation of adademic freedom have related essentially to out-of-class matters such as the requirement that a teacher submit to a loyalty oath, e.g., *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), or give testimony before a legislative investigating committee, e.g., *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), or to a teacher's dismissal for commenting on matters of public concern, *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), or exercising other constitutional rights. *Slochower* v. *Board of Education*, 351 U.S. 551 (1956). Academic freedom in the classroom itself has come

before this Court only in the context of challenges to state laws that have prohibited the teaching of particular subjects or ideas, as in *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), and *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). Although it is indisputable that a non-tenured teacher's contract cannot be refused renewal on grounds that are violative of the teacher's First Amendment rights, *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the precise nature of those rights as they relate to teaching in the classroom have not been defined by this Court in any case. As a result, as suggested by the Court of Appeals, it may indeed be that the meaning of academic freedom is "amorphous."

It is the teaching in the classroom, however, that goes to the essence of academic freedom. As this Court stated in *Keyishian* v. *Board of Regents*, 385 U.S. at 603:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"

In *Sweezy* v. *New Hampshire*, 354 U.S. at 250, the Court noted that, "To impose any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of the Nation," and in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 511

(1968), it emphasized that, "In our system students may not be regarded as the closed circuit recipients of only that which the state chooses to communicate."

The invalidation of overbroad loyalty oaths and legislative inquiries because of their possible chilling effect on academic freedom, as in *Keyishian, Sweezy* and similar cases, is likewise related to the crucial importance of free classroom inquiry, and it is paradoxical to say, as did the Court of Appeals, that the state may not inhibit academic freedom by these means, but that it may do so by acting on classroom teaching itself and refuse to renew a teacher's contract because her teaching methods are "too progressive" or "insufficiently orthodox." If the courts "have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief," *Epperson* v. *Arkansas,* 393 U.S. at 104, that mandate must extend to classroom teaching itself, and this teaching cannot be placed in a "straitjacket" by the threat of non-renewal due to "displeasure with pedagogical attitudes."

As the Court of Appeals noted, the lower court cases dealing with in-class academic freedom have generally involved dismissal of teachers because of certain statements or assignments that the school officials found objectionable. It should also be pointed out that the plaintiffs in most of these cases were secondary and elementary school teachers. In the case at bar the question is squarely presented whether on the university level the academic freedom of a teacher includes the freedom to espouse a teaching philosophy or to employ teaching methods that differ from those approved by the governing University

officials. This question goes to the essence of in-class academic freedom and is a substantial and important question requiring resolution by this Court.

## II.

**In the case at bar the question of the meaning of in-class academic freedom is presented most clearly, and this is an appropriate case for the Court to grant certiorari to resolve that question.**

In the case at bar the issue of the meaning of in-class academic freedom is presented very strikingly. As the Court of Appeals stated with respect to the District Court's conclusion that the refusal to renew the petitioner's contract was based on disagreement with the petitioner's educational philosophy and teaching methods:

> "The evidence to which the court referred consisted in part of plaintiff's testimony and that of her students, and the testimony of the defendants concerning what was expected of teachers at Eastern Kentucky. The school administration considered the students as generally unsophisticated and as having 'somewhat restrictive backgrounds,' and for this reason apparently expected the teachers to teach on a basic level, to stress fundamentals and to follow conventional teaching patterns—in a word, to 'go by the book.' Plaintiff's evidence, on the other hand, tended to show that her teaching emphasized student responsibility and freedom to organize class time and out-of-class assignments in terms of student interest, all in an effort, she claims, to teach them how to think rather than merely to accept and to parrot what they had heard." App., *infra,* pp. 3a-4a.

The question is whether the First Amendment's guarantee of academic freedom protects the right of a University teacher to try to teach students to think for themselves rather than always to "go by the book." It must be emphasized again that what is involved here is the meaning of academic freedom at the university level, not at a secondary or elementary school, where perhaps some restraints might be justified because of the relative youth of the students and the difference in function between these schools and universities. See the discussion in *Mailloux* v. *Kiley*, 323 F. Supp. 1387, 1392 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971). The case, moreover, does not involve a refusal to obey specific directives, even if the issuance of such directives were permissible on the university level, or to follow a prescribed curriculum. Cf. *Ahern* v. *Board of Education of the School District of Grand Island*, 456 F.2d 399 (8th Cir. 1972); *Clark* v. *Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 93 S. Ct. 2148 (1973). Nor does it involve the use of highly unconventional or "shock effect" tactics. It involves the right to pursue different teaching methods and to hold a different educational philosophy, and challenges the power of university officials to "cast a pall of orthodoxy over the classroom," *Keyishian* v. *Board of Regents, supra*, by terminating the contracts of teachers who do not agree with their views.

The First Amendment's guarantee of academic freedom to teachers is a representational right, and in particular is for the benefit of the students who must be "trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian* v. *Board of Regents, supra.* In the case at bar the petitioner's employment was terminated because of

disagreement with her educational philosophy and teaching methods, and this, it is submitted, deprived the students at Eastern Kentucky University of their right to be presented with a different kind of educational experience than that to which they had previously been subjected. As Gary Winn, a student in petitioner's English Composition course, whose parents requested the investigation into the petitioner's classroom teaching, testified:

> "She tried to get us to think for ourself and tried to, you know, everything has been put to you so much, you think this, you know, and she was just trying to get us to think for ourselves and work on our own . . . (Tr. 427).
>
> I would still consider her different, because most of them [the other teachers at Eastern Kentucky University], you know, the ones I have run into are still about the same, they follow the textbook and this kind of thing and stick to the same format, but I can look back now and appreciate what Miss Hetrick tried to do, tried to get me—and how she tried to get me to think at the time and use my mind" (Tr. 432).

If the constitutional guarantee of academic freedom means anything, it must protect the right to teach students to think, and it is that right which is involved in this case. This is a particularly appropriate case for this Court to grant review so that it may define the contours of in-class academic freedom and decide whether a teacher at a public university must, on pain of non-renewal of her contract, conform to the educational philosophy and teaching methods favored by the governing officials of the university.

## III.

**The Court of Appeals has completely misinterpreted the thrust of this Court's decision in *Board of Regents of State Colleges* v. *Roth*, and certiorari should be granted to correct this erroneous interpretation.**

The Court of Appeals was of the view that this Court's decision in *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), effectively precluded it from holding that the First Amendment's guarantee of academic freedom protects the right of a teacher at a public university to hold a different educational philosophy and to employ different teaching methods from those favored by the governing officials of the University. It saw the decision in *Roth* as sanctioning the termination of a teacher's employment for "entirely arbitrary reasons," and stated that if a teacher's contract could not be terminated because of disagreement with her educational philosophy and teaching methods, every non-renewal decision would be "a likely candidate for a court suit." *Roth*, however, dealt only with the question whether the Fourteenth Amendment's guarantee of procedural due process entitled a teacher to notice of reasons and a hearing upon non-renewal. In the companion case of *Perry* v. *Sindermann*, 408 U.S. 593 (1972), this Court made it unmistakably clear that the First Amendment was fully applicable to the termination of a teacher's employment by non-renewal of his contract, and that it applied equally to teachers who did not have tenure and to those who had. The question in the case at bar is whether the First Amendment precludes a public university from refusing to renew a teacher's contract because of disapproval of her educational philosophy and teaching methods, and it is difficult

to see how this Court's holding as to the procedural rights of teachers whose contracts have not been renewed is relevant to the resolution of that question.

It appears that the Court of Appeals read *Roth* as signalling a "hands-off" attitude toward non-renewal of faculty appointments except where the non-renewal can be shown to have been predicated upon clearly protected out-of-class expressions or associations. At a time when university teaching posts are becoming in short supply, it is particularly important that university officials not be permitted to use the power of non-renewal of contracts to coerce intellectual conformity. Precisely because university teachers are not entitled to the procedural guarantees of notice of reasons and a hearing in the case of non-renewal, they should at least have the strong protection of the First Amendment, and where it can be shown, as here, that the non-renewal decision was designed to coerce intellectual conformity, the First Amendment should apply.

The Court of Appeals completely misinterpreted the thrust of this Court's holding in *Roth*. This Court should grant certiorari in order to correct that misinterpretation and to define the contours of First Amendment protection in the area of non-renewal of university teaching contracts.

## CONCLUSION

**For the reasons stated above, the Petition for a Writ of Certiorari should be granted.**

Respectfully submitted,

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September 1973

APPENDIX

## APPENDIX

### Opinion of the United States Court of Appeals

No. 72-2168

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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PHYLLIS B. HETRICK,

*Plaintiff-Appellant,*

—v.—

ROBERT R. MARTIN, President of Eastern Kentucky University, and THE BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY,

*Defendants-Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed June 15, 1973.

Before: PECK, McCREE and KENT,* Circuit Judges.

McCREE, Circuit Judge. This appeal requires us to decide whether the First Amendment prevents a state university from discharging a teacher whose pedagogical style and philosophy do not conform to the pattern prescribed by the school administration. The district court, sitting without a

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* Judge Kent participated in the decision in this case and concurred in this opinion prior to his death on May 28, 1973.

jury, held that the Constitution did not bar officials of Eastern Kentucky University from refusing to renew plaintiff's teaching contract on the ground of impermissible deviation from the teaching standards thought appropriate by her superiors. We affirm.

Plaintiff Phyllis Hetrick was employed as a nontenured assistant English professor at Eastern Kentucky for the 1969-70 school year, and during her first semester was assigned to teach two sections of freshman composition, one sophomore literature course, and an upper level modern drama course. Her troubles with the school administration apparently began when unnamed students as well as the parents of one student complained about certain of her in-class activities. Specifically, at one point, in an attempt to illustrate the "irony" and "connotative qualities" of the English language, she told her freshman students "I am an unwed mother." At the time, she was a divorced mother of two, but she did not reveal that fact to her class. Also, she apparently on occasion discussed the war in Vietnam and the military draft with one of her freshman classes. The district court found that even though the school administration was concerned about the appropriateness of these occurrences, "it does not appear that any of the faculty members felt that Dr. Hetrick had on those particular occasions exceeded the bounds of her teaching prerogative." The student complaints during October and November 1969 allegedly centered on their inability to comprehend what she was attempting to teach them or what was expected of them, although no students were produced at trial to testify that he or she had complained about or was dissatisfied with plaintiff's teaching methods.

Other conflicts between Dr. Hetrick and her superiors developed. She did not obtain her PhD until late in her sec-

ond semester, although she agreed that she would do so by the close of the first semester. She covered only 11 plays in her modern drama course, from a textbook that had been ordered by her predecessor, and the head of the English Department, Dr. Thurman, testified that plaintiff had been told that she was expected to cover between 20 and 25 plays and that he thought the work load she assigned was too light.

In February 1970, Dr. Thurman convened a "secret evaluating committee" of four other faculty members of the English Department to meet with him. The committee, according to Dr. Thurman, was to evaluate all the nontenured teachers. Dr. Thurman recommended to the committee that plaintiff not be rehired for the following year because: her freshman class assignments were inconclusive; she was inclined to discuss extraneous matter in class; she lacked "a sense of camaraderie" and did not seem to adjust to the other members of the English Department; and she had not fulfilled her PhD requirements as promised. The committee voted to terminate Dr. Hetrick.

The district court found that these reasons asserted by Dr. Thurman were "supported by fact." However,

> the court finds from the tenor of the evidence that the nonrenewal of Dr. Hetrick's contract was not based so much on those specific reasons, as it was on the feeling of Dr. Thurmond [sic] and the other faculty members of the English Department that Dr. Hetrick's teaching philosophy and the manner in which she implemented it were not adaptable to the achievement of the academic goals of the University.

The evidence to which the court referred consisted in part of plaintiff's testimony and that of her students, and

the testimony of the defendants concerning what was expected of teachers at Eastern Kentucky. The school administration considered the students as generally unsophisticated and as having "somewhat restrictive backgrounds," and for this reason apparently expected the teachers to teach on a basic level, to stress fundamentals and to follow conventional teaching patterns—in a word, to "go by the book." Plaintiff's evidence, on the other hand, tended to show that her teaching emphasized student responsibility and freedom to organize class time and out-of-class assignments in terms of student interest, all in an effort, she claims, to teach them how to think rather than merely to accept and to parrot what they had heard.

After her termination by the University, plaintiff brought this action under 42 U.S.C. § 1983 for declaratory and injunctive relief against the president and regents of Eastern Kentucky University. She asserted that her First and Fourteenth Amendment rights had been violated by her termination without a hearing or written statement of reasons, on an arbitrary basis, for making in-class statements about the war and the draft, and because of her beliefs and ideas. The intervening decisions of the Supreme Court in *Board of Regents of State College* v. *Roth*, 408 U.S. 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), narrowed the issue in this case to whether plaintiff had been terminated for conduct on her part protected by the First Amendment. See *Perry* v. *Sindermann, supra*, 408 U.S. 596-98.

The district court concluded that the decision not to renew plaintiff's contract was the result of defendants' "concern for her teaching methods and ability," and was not prompted by her exercise of First Amendment rights. In discussing the scope of the protection afforded teachers by the First Amendment, the court stated:

> The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught, but it does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ. A University has a right to require some conformity with whatever teaching methods are acceptable to it. In this case it simply appears that Dr. Hetrick's teaching techniques were not acceptable to the University. The court is not in a position to weigh the merits of Dr. Hetrick's educational philosophy—it may be that her methods of teaching were and are more desirable than those embraced by the other members of the English Department—but the fact that the University decided that they were not and chose not to renew her contract, does not mean that her constitutional rights to academic freedom and freedom of speech were impinged.

In a memorandum opinion filed with the court's findings of fact and conclusions of law, the court elaborated on its findings in this regard:

> It is Dr. Hetrick's position that the non-renewal of her contract resulted from certain statements she made in her classes relating to the Vietnam War and the military draft. Were this contention adequately corroborated it may be that relief would be proper, however, the evidence produced at the hearing leads only to the conclusion that the University's determination not to rehire was based solely upon concern for her pedagogical attitudes. Although the court is inclined to believe that the classroom inadequacies that Dr. Het-

rick was alleged to have displayed—inconclusive assignments, extraneous classroom discussions, and insufficient coverage of suggested materials—were largely superficial and thus easily correctable, it is not the duty of the court to evaluate the wisdom of the University's decision not to renew the contract. It simply seems that Dr. Hetrick's teaching methods were too progressive, or perhaps less orthodox than the other faculty members in her department felt were conducive to the achievement of the academic goals they espoused. The court must conclude that a State University has the authority to refuse to renew a non-tenured professor's contract for the reason that the teaching methods of that professor do not conform with those of the tenured faculty or with those approved of by the University.

On appeal, plaintiff has raised two issues: does it violate the First Amendment for a public university to terminate a teacher because her teaching methods and educational philosophy do not conform with those approved by the university; did the district court err in concluding that the decision to terminate was not based on or influenced by constitutionally protected statements she made in the classroom, *i.e.*, the "unwed mother" remark and statements about the Vietnam war and the draft?

With respect to the latter issue, assuming *arguendo* that the uttering of these in-class statements would be protected by the First Amendment,[1] we conclude upon examination of the record that the findings of the district court are fully

[1] *Compare, e.g., Mailloux* v. *Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971), *with Clark* v. *Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3595 (U.S. May 7, 1973).

supported by the evidence and that plaintiff was not discharged because of any statements she may have made.

Thus, we are squarely presented with the question whether the administration of a public school may, consistent with the First Amendment, fail to renew a nontenured teacher because of displeasure with her "pedagogical attitudes." We conclude, as did the district court, that it may.

This is not a case of dismissal of a teacher for exercising her right as a citizen to comment on matters of public concern, *see Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *cf. Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969), or a case of a state's attempting to regulate the fitness and competence of its teacher by investigating the teachers' out-of-class associations, *see Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Sweezy* v. *New Hampshire,* 354 U.S. 234 (1957), or even a case of a state's effort to restrict in-class utterances or assignments in order to maintain curriculum control, *compare Keefe* v. *Geanakos,* 418 F.2d 358 (1st Cir. 1969); *Mailloux* v. *Kiley,* 323 F. Supp. 1387 (D. Mass.), *aff'd,* 448 F.2d 1242 (1st Cir. 1971); *Parducci* v. *Rutland,* 316 F. Supp. 352 (M.D. Ala. 1970), *with Clark* v. *Holmes,* 474 F.2d 928 (7th Cir. 1972), *cert. denied,* 41 U.S.L.W. 3595 (U.S. May 7, 1973); *Parker* v. *Board of Education,* 237 F. Supp. 222 (D. Md.), *aff'd,* 348 F.2d 464 (4th Cir. 1965), *cert. denied,* 382 U.S. 1030 (1966); *cf. Epperson* v. *Arkansas,* 393 U.S. 97 (1968); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923); *see generally Developments in the Law—Academic Freedom,* 81 Harv. L. Rev. 1045, 1051-54 (1968).

Instead, this is a case of the nonrenewal of a nontenured teacher, who was not even entitled to notice and hearing

upon receipt of the university's decision not to renew her contract. *Board of Regents of State College* v. *Roth, supra.* Although her renewal could not have been denied on a basis that invaded a constitutionally protected interest such as her interest in freedom of speech, *Perry* v. *Sindermann, supra,* 408 U.S. at 597, under the holding in *Board of Regents of State College* v. *Roth, supra,* she presumably could have been terminated for entirely arbitrary reasons that did not invade First Amendment rights. She seeks to escape the effect of this principle by claiming that what is at issue here is her constitutional right to "teach her students to think" and that the First Amendment protects her from termination for using teaching methods and adhering to a teaching philosophy that are "well-recognized within the profession" (although it does not appear that plaintiff introduced expert testimony on this question, *compare Mailloux* v. *Kiley, supra,* 323 F. Supp. 1387). Plaintiff would thus have us convert the vague, inclusive term "teaching methods" into a specific, protected form of speech that cannot be considered by a school administration in determining whether a nontenured teacher should be renewed. In effect, plaintiff would have us substitute the First Amendment for tenure, and would thereby succeed in elevating contract law to constitutional status.

We do not accept plaintiff's assertion that the school administration abridged her First Amendment rights when it refused to rehire her because it considered her teaching philosophy to be incompatible with the pedagogical aims of the University. Whatever may be the ultimate scope of the amorphous "academic freedom" guaranteed to our Nation's teachers and students, *Healy* v. *James,* 408 U.S. 169, 180-81 (1972), *see generally Developments in the Law—Academic*

*Freedom, supra,* it does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession. A contrary holding would effectively emasculate the holding in *Board of Regents of State College* v. *Roth, supra,* by rendering every nonrenewal decision a likely candidate for a court suit, and we decline to accomplish the *sub silentio* overruling of that recent Supreme Court decision as well as our own in *Orr* v. *Trinter,* 444 F.2d 128 (6th Cir. 1971), *cert. denied,* 408 U.S. 943 (1972).

For the foregoing reasons, and the reasons advanced by the district court, the judgment of the district court is affirmed.

## Order of Dismissal

[Filed October 6, 1972]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 2175

PHYLLIS B. HETRICK,

*Plaintiff,*

v.

ROBERT B. MARTIN, President of Eastern Kentucky University, and THE BOARD OF REGENTS, Eastern Kentucky University,

*Defendants.*

It is ordered and adjudged that the plaintiff take nothing and that the action be dismissed on the merits.
See Memorandum.

MAC SWINFORD
*Judge*

OCT 6 1972

## Findings of Fact and Conclusions of Law

[Filed October 6, 1972]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 2175

---

PHYLLIS B. HETRICK,

*Plaintiff,*

v.

ROBERT B. MARTIN, President of Eastern Kentucky University, and THE BOARD OF REGENTS, Eastern Kentucky University,

*Defendants.*

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The record of this case is submitted to the court for final judgment. In accordance with Rule 52(a) of the Federal Rules of Civil Procedure the court makes the following findings of fact and conclusions of law.

### FINDINGS OF FACT

1) The plaintiff, Phyllis Hetrick, was employed as a non-tenured assistant professor of English at Eastern Kentucky University during the 1969-1970 academic school year. The appointment was to fill a permanent vacancy in the Department of English, and it was anticipated that the contract

would be renewed for a second year or until tenure could be acquired. Notwithstanding Dr. Hetrick's expectation of renewal, the University was under no contractual obligation to rehire her for a second year.

2) Dr. Hetrick was, for the fall semester of 1969, assigned to teach two sections of Freshman Composition, one section of A Survey of Masterpieces of World Literature, and one upper division course in Modern Drama.

3) Dr. Hetrick, who is a divorced mother, made the remark during an introductory session of one of her English Composition classes that, "I am an unwed mother". Presumably the statement was made to exhibit the irony and connotative quality of the English language. Dr. Hetrick also had occasion early in the semester to discuss with one of her sections of English Composition the Vietnam War and the military draft.

4) Several of Dr. Hetrick's students were concerned with her "unwed mother" statement and her class discussion of the Vietnam War. It also appears that there was some consternation among certain of the University administrators regarding those occurrences. Correspondence between faculty members of the English Department and University administrators indicates that it was the position of the English Department that the discussion of the Vietnam War was not entirely appropriate in an English Composition class and that the "unwed mother" statement, although perhaps a suitable example to show the flavor of language, should not have been left unexplained, as was done by Dr. Hetrick. Despite the concern over these incidents, it does not appear that any of the faculty members felt that Dr. Hetrick had on those particular occasions exceeded the bounds of her teaching prerogative.

5) During the months of October and November numerous complaints were addressed to the University Ombudsman concerning the nature of Dr. Hetrick's composition classes. Similar complaints were also addressed to members of the English Department faculty. It appears that several of Dr. Hetrick's students were unable to discern what she was attempting to achieve; did not understand what was required of them; and felt that they were not being instructed in English Composition as they thought they should be.

6) When Phyllis Hetrick was hired it was agreed that she would complete her Ph.D. requirements within her first semester at Eastern. Although she did not obtain her degree, it was not granted until the close of her second semester of teaching at Eastern. This delay was of some concern to Dr. Thurmond, the Chairman of the English Department. He was apparently left with the impression that Dr. Hetrick had a propensity to temporize about things which he considered to be of importance.

7) It was understood by the University that Dr. Hetrick would specialize in teaching Modern Drama, and during her first semester at Eastern she was assigned an upper level course in Modern Drama. Although it appears that Dr. Thurmond had hoped that she would cover 20 plays in that course, her class only studied 11. Dr. Thurmond testified that he felt Dr. Hetrick's performance in her drama class was "miserable"; that the class was not nearly rigorous enough; and that, under Dr. Hetrick's instruction, it did not compare in work load or degree of difficulty with its companion courses in contemporary novel and poetry.

8) In late February of 1970, Dr. Thurmond called a "secret evaluating committee" to evaluate all of the teach-

ers on one year contracts. This committee was made up of five members of the English Department, including Dr. Thurmond. The committee determined that Dr. Hetrick's contract should not be renewed and she was so informed the following day. Dr. Thurmond testified that neither Dr. Hetrick's class discussion of the Vietnam War nor her "unwed mother" remark were mentioned or discussed by the committee. Dr. Thurmond's recommendation that Dr. Hetrick not be rehired was based upon his belief that: 1) her class assignments in Freshman Composition were inconclusive; that 2) it appeared she was inclined to discuss extraneous matter in her classes; that 3) she lacked a sense of camaraderie and did not seem to adjust with the other members of the Department; and that 4) she had been unable to fulfill her Ph.D. requirements as promised. The other members of the committee concurred with Dr. Thurmond's recommendation and accordingly voted not to renew her contract.

9) The court finds that the reasons upon which Dr. Thurmond's recommendation for non-renewal was based are supported by fact. However, the court finds from the tenor of the evidence that the non-renewal of Dr. Hetrick's contract was not based so much on those specific reasons, as it was on the feeling of Dr. Thurmond and the other faculty members of the English Department that Dr. Hetrick's teaching philosophy and the manner in which she implemented it were not adaptable to the achievement of the academic goals of the University. This difference in pedagogical attitudes was noted by Dr. Hetrick in her testimony:

> "Well let me state that I felt that the way the objectives of the department were stated, suggested certain

assumptions about what students are that were different from the basic assumptions I have, which guide my teaching, and I think this is one of the reasons why some students see me as different from other of the more traditional teachers." (Tr. 461).

Based upon the foregoing findings of fact the court makes the following conclusions of law.

## Conclusions of Law

1) The court has jurisdiction over this matter under 28 U.S.C. 1343 and 42 U.S.C. 1983.

2) A person does not have a constitutional right to public employment, but a governmental employee may not be dismissed from his job for constitutionally impermissible reasons. A state may not discourage the exercise of one of its employee's First Amendment rights by the threat of or actual termination of that person's employment. Hetrick v. Martin, 322 F. Supp. 545 (1971); and Orr v. Trinter, 444 F. 2d 128 (6 Cir. 1971).

3) A University is not compelled to grant a non-tenured professor an evidentiary hearing prior to the non-renewal of that professor's contract. Board of Regents v. Roth, —— U.S. —— (1972).

4) The plaintiff in this action would only be entitled to relief if the defendants' decision not to renew her contract was precipitated by the plaintiff's exercise of First Amendment rights.

5) Based upon the evidence offered at the hearing and that submitted in the record it is the conclusion of the court

that the decision of the University not to renew Dr. Hetrick's contract was not motivated by her participation in First Amendment activities. The court is satisfied that the defendants' decision not to renew Dr. Hetrick's contract was based solely upon their concern for her teaching methods and ability. Whether the University's decision was wise is of no importance here, inasmuch as the evidence demonstrates that the decision was not affected by Dr. Hetrick's engagement in First Amendment activities.

The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught, but it does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ. A University has a right to require some conformity with whatever teaching methods are acceptable to it. In this case it simply appears that Dr. Hetrick's teaching techniques were not acceptable to the University. The court is not in a position to weigh the merits of Dr. Hetrick's educational philosophy—it may be that her methods of teaching were and are more desirable than those embraced by the other members of the English Department —but the fact that the University decided that they were not and chose not to renew her contract, does not mean that her constitutional rights to academic freedom and freedom of speech were impinged.

An order will this day be entered granting judgment to the defendants and dismissing the action upon the merits.

MAC SWINFORD
*Judge*

OCT 6 1972

**Memorandum Opinion**

[Filed October 6, 1972]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 2175

PHYLLIS B. HETRICK,

*Plaintiff,*

v.

ROBERT B. MARTIN, President of Eastern Kentucky University, and THE BOARD OF REGENTS, Eastern Kentucky University,

*Defendants.*

The record of this case, instituted under the Civil Rights Act, 42 United States Code 1983, is submitted to the court for final judgment. The plaintiff, Dr. Phyllis B. Hetrick, contends that those rights, privileges and immunities secured to her by the Constitution have been denied her by officers of Eastern Kentucky University acting under color of State law.

In September of 1969, Dr. Hetrick was granted a one year contract to fill a vacancy in the faculty of the English Department at Eastern Kentucky University. In February of 1970, she was informed that her contract would not be renewed. It is argued that the decision not to renew the

contract was grounded upon the University's disapproval of the exercise of her First Amendment rights.

On February 23, 1971, the court overruled the defendants' motion to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted. Although it is clear that the termination of a non-tenured teacher's contract may not be, in most instances, litigable under contract law, it is equally clear that such a teacher may not be dismissed or not rehired for constitutionally impermissible reasons. As the court stated in its memorandum of February 1971, "a State, by and through its officials, may not elect to discontinue a contract of employment solely because the employee has exercised his constitutional rights in a manner which is displeasing to certain of his superiors." Hetrick v. Martin, 322 F. Supp. 545 (1971); and see Orr v. Trinter, 444 F. 2d 128 (6 Cir. 1971).

The single issue to be resolved is whether the University's decision not to rehire Dr. Hetrick was based upon her engagement in conduct protected by the First Amendment.

It is Dr. Hetrick's position that the non-renewal of her contract resulted from certain statements she made in her classes relating to the Vietnam War and the military draft. Were this contention adequately corroborated it may be that relief would be proper, however, the evidence produced at the hearing leads only to the conclusion that the University's determination not to rehire Dr. Hetrick was based solely upon concern for her pedagogical attitudes. Although the court is inclined to believe that the classroom inadequacies that Dr. Hetrick was alleged to have displayed —inconclusive assignments, extraneous classroom discussions, and insufficient coverage of suggested materials— were largely superficial and thus easily correctable, it is

not the duty of the court to evaluate the wisdom of the University's decision not to renew the contract. It simply seems that Dr. Hetrick's teaching methods were too progressive, or perhaps less orthodox than the other faculty members in her department felt were conducive to the achievement of the academic goals they espoused. The court must conclude that a State University has the authority to refuse to renew a non-tenured professor's contract for the reason that the teaching methods of that professor do not conform with those of the tenured faculty or with those approved of by the University.

It would be hoped that some form of teacher evaluation more equitable than the "secret evaluation committee" called to determine Dr. Hetrick's fate with the University could be devised. It is astonishing to the court that none of the members on the "secret evaluating committee", save perhaps Dr. Thurmond, had any substantive knowledge or familiarity of Dr. Hetrick or her classroom work. A decision making process of that sort would dangerously propend toward arbitrary determinations with no basis in fact. Nevertheless as a matter of constitutional due process it seems that a University is only required to grant a hearing to a tenured professor. Board of Regents v. Roth, —— U.S. —— (1972); Shields v. Watrel, 333 F. Supp. 260 (1971).

In the case of a non-tenured teacher, a State University may be held to account only when it can be shown by a preponderance of the evidence that the teacher, in the discharge of her duties, made statements or engaged in activities that were the exercise of her personal rights protected by the provisions of the Constitution of the United States. The plaintiff has not sustained this burden of proof.

It is the judgment of the court that the decision of the authorities of Eastern Kentucky University that Dr. Hetrick's contract should not be renewed was not influenced by or predicated upon any statements or activities which she made or in which she engaged that were protected by the First Amendment.

An order dismissing this action at the cost of the plaintiff is this day entered.

MAC SWINFORD
*Judge*

OCT 6 1972

## Opinion of District Court Denying Motion to Dismiss

[Filed February 23, 1971]

UNITED STATES DISTRICT COURT

E. D. KENTUCKY
LEXINGTON DIVISION

No. 2175

PHYLLIS B. HETRICK,

*Plaintiff,*

v.

ROBERT B. MARTIN, President of Eastern Kentucky University, and the BOARD OF REGENTS OF Eastern Kentucky University,

*Defendants.*

SWINFORD, District Judge.

This proceeding is before the court on a motion by the defendants to dismiss for failure to state a claim upon which relief may be granted.

Plaintiff, Mrs. Phyllis B. Hetrick, has instituted this action under section 1983 of Title 42, United States Code. On September 1, 1969, Mrs. Hetrick was given a one year contract to fill a permanent vacancy in the Faculty at Eastern Kentucky University. It was anticipated that the contract would be renewed until Mrs. Hetrick acquired tenure.

In October, 1969, during the "Vietnam Moratorium" she had occasion to discuss the Vietnam War and military draft in one of her classes. Subsequently, it is alleged, she was accused of having engaged in draft counseling and on February 27, 1970, she was informed that her contract would not be renewed. She requested that she be given a hearing and written reasons for the non-renewal of her contract, but, it is asserted, no hearing was granted and no reasons were given, except that she was "unsociable" and that her class assignments were "inconclusive".

It is the plaintiff's contention that the decision not to renew her contract was arbitrary and capricious without regard to her professional qualifications in violation of the First and Fourteenth Amendments to the Constitution of the United States. Mrs. Hetrick claims that Eastern Kentucky University, acting through and by its Board of Regents, and Robert Martin, President of Eastern Kentucky University, have acted in such a manner as to deny and deter the free exercise of her First Amendment rights.

Included in the defendants' motion to dismiss is the contention that the complaint fails to make sufficient jurisdictional allegations. It is the judgment of this court that its jurisdiction has been properly invoked and that the action is properly filed under section 1343(3) (4) of Title 28 and section 1983 of Title 42, United States Code. See Brown v. Strickler, 422 F.2d 1000 (6 Cir. 1970). It is clear from the complaint, although not expressly stated, that the plaintiff asserts that those rights, privileges and immunities secured to her by the Constitution have been deprived her by certain officials and agents of the State supposably acting under authority or color of State law.

The sole function of the court at this stage of the proceedings is to determine whether the complaint, assuming

its allegations to be true, states a cause of action. The strength or merit of the plaintiff's claim is not something the court may consider at this juncture, as the determination of whether the plaintiff can prevail may only be decided on the basis of proof, and not the pleadings.

The defendants' motion to dismiss is grounded upon the theory that the plaintiff, in accepting the one year contract, had only an expectancy to have her contract renewed. It is argued that an expectancy will not support a claim for relief; that Eastern Kentucky University, by and through its officers, had a right to refuse to renew the plaintiff's contract. Moreover, it is claimed the decision not to renew Mrs. Hetrick's contract did not, nor does not deprive her of her constitutional rights.

It is apparent from an examination of recent analogous federal cases that there is some difficulty in ascertaining under what set of circumstances a non-tenured State teacher or professor may initiate a constitutional attack against his dismissal. Jones v. Hopper, 410 F.2d 1323 (10 Cir. 1969); Johnson v. Branch, 364 F.2d 177 (4 Cir. 1966); McLaughlin v. Tilendis, 398 F.2d 287 (7 Cir. 1968); and Roth v. Board of Regents of State Colleges, 310 F.Supp. 972 (D.C.1970). It may be fairly stated that an employee of a State does not have a constitutional right to have his contract renewed, however, a State, by and through its officials, may not elect to discontinue a contract of employment solely because the employee has exercised his constitutional rights and privileges in a manner which is displeasing to certain of his superiors. This is somewhat of a paradoxical statement for it boils down to the proposition that a person does not have a constitutional right to public employment, but does have a constitutional right not to be dismissed (for certain reasons) from public employ-

ment. The United States Court of Appeals for the Fifth Circuit in the case of Pred v. Board of Public Instruction of Dade County, Fla., 415 F.2d 851 (1969) was confronted with the argument that a holder of an unrenewed contract for public employment may avenge his loss only through contractual remedies (which in the case of non-tenured teachers may not exist), as there is no constitutional right to public employment. The court concludes that the argument was specious as it was an effort to dilute a constitutional right to a contractual one:

> "Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any rights protected by § 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractual one, nor could it be since no right to reemployment existed. What is at stake is the vindication of constitutional rights—the right not to be punished by the State or to suffer retaliation at its hand because a public employee persists in the exercise of First Amendment rights." 415 F.2d at 856.

In Ferguson v. Thomas, 430 F.2d 852 (1970), the Court of Appeals for the Fifth Circuit cited its opinion in Pred and stated:

> "While he (State college instructor) has no right to continued public employment, such a teacher may neither be dismissed or not be rehired for constitutionally impermissible reasons such as race, religion, or the assertion of rights guaranteed by law or the Constitution.

This rationale would even apply to a teacher without tenure or an expectancy of reemployment."

In the instant case the court does not take issue with the assertion that Mrs. Hetrick did not nor does not have a contractual right to be rehired. However, Mrs. Hetrick does have the right to exercise certain freedoms of speech which cannot be discouraged by the State. The defendants' motion to dismiss must be overruled. The principal questions raised by the pleadings are whether Mrs. Hetrick's activities came within the area of speech protected by the First Amendment and whether her dismissal was predicated on her engagement in those activities.

An order denying the defendants' motion to dismiss will this day be entered.

SUPREME COURT, U. S.

SUPREME COURT, U. S.
FILED
OCT 11 73
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-470

PHYLLIS B. HETRICK - - - - Petitioner

*versus*

ROBERT R. MARTIN, President of Eastern Kentucky University, and
THE BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY - - Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

## BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-470

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PHYLLIS B. HETRICK - - - - *Petitioner*

*v.*

ROBERT R. MARTIN, President of Eastern Kentucky University, and
THE BOARD OF REGENTS OF EASTERN KENTUCKY UNIVERSITY - - - *Respondents*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion delivered by the Court of Appeals for the Sixth Circuit was entered June 15, 1973, but has not yet been officially reported. The opinion is copied in the Appendix to the Petition for a Writ of Certiorari at page 1a. The decision for the United States District Court for the Eastern District of Kentucky is not officially reported, but its Memorandum Opinion, Findings of Fact, and Conclusions of Law are appended to the Petition for a Writ of Certiorari at pages 17a,

11a, and 15a respectively. The opinion of the United States District Court for the Eastern District of Kentucky denying defendants' motion to dismiss is officially reported at 322 F. Supp. 545 and appended to the Petition for Writ of Certiorari at page 21a.

## JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

## CONSTITUTIONAL PROVISION INVOLVED

The Constitutional Provision Involved are set forth in the Petition for a Writ of Certiorari.

## QUESTION PRESENTED

Whether the Administration of a Public University May, Consistent with the First and Fourteenth Amendments, Fail to Renew a Nontenured Teacher Because her "Teaching Methods," "Educational Philosophy," and "Pedagogical Attitudes" are Considered Inappropriate by her Superiors?

## COUNTERSTATEMENT OF THE CASE

A counterstatement by Respondents might be unnecessary except for what would appear to be a carefully contrived misrepresentation on pages 9 and 10 of Petitioner's statement of the case, which is as follows (emphasis added):

> "The District Court *found* that the *reasons* advanced by Dr. Thurman and the University officials were 'largely superficial' and that the alleged inadequacies on the part of the petitioner were 'easily correctable.' "

The District Court did not, of course, make any such finding. The apparent source of Petitioner's misstatement is the following observation appearing in the District Court's opinion (pp. 18a and 18b of the Petition for Certiorari):

> "Although the court is *inclined to believe* that the classroom inadequacies that Dr. Hetrick was alleged to have displayed . . . were largely superficial and thus easily correctable, it is not the duty of the court to evaluate the wisdom of the University's decision not to renew the contract." (Emphasis added.)

There is, it seems to Respondents, a gross difference between a passing comment to the effect that the teacher's *inadequacies* were superficial and easily correctable and a finding that the *University's reasons for not renewing her contract* were superficial. The pertinent facts upon which the decisions of the District Court and the Sixth Circuit are excellently set forth in the opinion of the Sixth Circuit (appendix to Petition for a Writ of Certiorari, pp. 1a-7a).

As this court will readily perceive, the essential finding of the trial court was that the Petitioner had failed to overcome the burden of proving to the satisfaction of the trier of fact the one and only fact she sought to prove and had to prove in order to sustain

a cause of action—that in determining not to renew her contract the administrative officials of the University were motivated by a disapproval of what she had said and done in the exercise of her right of free speech under the First Amendment.

Having thus failed to carry the battle by frontal assault, her posture now is to say that she never really had to fight that battle anyway—that the University simply had no right in the first place to pass judgment on her qualities as a teacher, because, after all, teaching methods, objectives, and philosophies are no business of the University—whatever they may be, they fall within the exclusive, private, constitutionally-protected domain of the individual teacher himself. That is the proposition—the absurd proposition—now laid at the doorstep of this court by the Petition for Certiorari.

## ARGUMENT

### "Teaching Methods," "Educational Philosophies," and "Pedagogical Attitudes" of a Nontenured Teacher Are Constitutionally Permissible Considerations for a University in Deciding Renewal or Nonrenewal of a Teacher's Contract.

The single thrust of Petitioner's original claim in this case was that her contract was not renewed because she made statements about Vietnam, the draft, and other controversial matters in her Freshman English classes, the consideration of which was violative of her First Amendment Rights. Petitioner failed to satisfy

her burden of proof; the District Court held (Appendix to Petition for Writ of Certiorari, p. 16a):

> "The court is satisfied that the defendants' decision not to renew Dr. Hetrick's contract was based solely upon their concern for her teaching methods and ability. *Whether the University's decision was wise is no importance here, inasmuch as the evidence demonstrates that the decision was not affected by Dr. Hetrick's engagement in First Amendment activities.*" (Emphasis added.)

The Sixth Circuit stated, "* * * We conclude upon examination of the record that the findings of the district court are fully supported by the evidence and that plaintiff was not discharged because of any statements she may have made." (Appendix to Petition for Writ of Certiorari, pp. 6a-7a.)

On appeal to the Sixth Circuit and in her Petition for a Writ of Certiorari, Petitioner deserted her original claim and is now asking this court to declare that the reasons the University had for not renewing her contract amounted to constitutionally forbidden invasions of her freedom to carry out her contractual duties—or not carry them out—in such manner as she alone saw fit. In essence, she espouses a purported rule of law that would reduce school systems to mere paymasters utterly devoid of authority to exercise any judgment with regard to the competence of nontenured faculty members. Her argument is based upon the premise that Eastern Kentucky University is against teaching students how to "think." This assumption is preposterous and is nowhere substantiated in the record.

The purposes of any university are multifold, one of which is, of course, the teaching of students to think for themselves. The basic question here is whether the trained administrators of a university, or a member of the faculty not yet sufficiently experienced even to be entrusted with tenure, is in the rightful position to determine and direct the means by which those purposes may best be achieved. The obvious answer is that academic objectives and methods cannot be left to the discretion of each and every individual faculty member; they must be left to the governing authorities of the University. How else could any standard level of achievement—indeed of education itself—be attained?

The District Court stated:

> "The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught, but it does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ. A university has the right to require some conformity with whatever teaching methods are acceptable to it." (Appendix to Petition for a Writ of Certiorari, p. 16a.)

And as the Sixth Circuit said, "whatever the ultimate scope of the amorphous 'academic freedom' guaranteed to our Nation's teachers and students (cited cases omitted), it does not encompass the right of a non-tenured teacher to have her teaching style insulated from review by her superiors when they determine

whether she has merited tenure status just because her methods and philosophy are considered acceptable somewhere within the teaching profession." (Appendix to Petition for Writ of Certiorari, pp. 8a-9a.)

The evidence pertaining to this matter of "teaching methods" related to Petitioner's teaching of Freshman English classes and one course in Modern Drama. In Freshman English, Petitioner was, in substance, told to stress fundamentals and relate outside topics to English Composition. In the Modern Drama course, the District Court in its Finding of Facts stated (Appendix to Petition for Writ of Certiorari, p. 13a):

> "It was understood by the University that Dr. Hetrick would specialize in teaching Modern Drama, and during her first semester at Eastern she was assigned an upper level course in Modern Drama. Although it appears that Dr. Thurmond had hoped that she would cover 20 plays in that course, her class only studied 11. Dr. Thurmond testified that he felt Dr. Hetrick's performance in her drama class was 'miserable'; that the class was not nearly vigorous enough; and that, under Dr. Hetrick's instruction, it did not compare in work load or degree of difficulty with its companion courses in contemporary novel and poetry."

In regard to Petitioner's approach to teaching, President Martin expressed his general educational philosophy. He testified (TR 274):

> "A. I always had the feeling that you had to know where a student was in his development before you can do a good job of teaching. Now you can overlook that if you will, but your teach-

ing is poorer because of it. Certainly, in education courses we are taught forever that you take the student where he is and develop him from that point, that you can't take him from any other place other than the place where he is in his development.

Q. And it is your position that teachers at Eastern should proceed on the assumption that students come from somewhat restricted backgrounds and are generally unsophisticated?

A. My position is that they ought to understand that we have a wide mix, that we have in the main first generation college students, their mothers and dads have not attended college and it is a very rare one who attends Eastern who comes from a background of that nature and my opinion of it is that certainly should be taken into consideration."

As the Sixth Circuit noted in its opinion, Petitioner's evidence demonstrated that she did not adhere to methods and approaches consistent with the policies expressed by President Martin, the Dean of the College of Arts and Sciences or the Chairman of the Department of English. To the contrary, she emphasized student responsibility and organization of their own topics and time. Respondents submit that certainly such differences are proper considerations in determining whether a nontenured teacher's contract should be renewed. If they are held to be constitutionally impermissible, then what considerations are left which differ from those attributable to tenure? Contrary to Petitioner's limited interpretation of *Board of Regents of State College* v. *Roth,* 408 U. S. 564 (1972), Re-

spondents' understanding of the case is that the very reason for its ultimate holding was the difference in the rights of tenured vis-a-vis nontenured teachers. Respondents agree that the basic issue was whether procedural due process required a notice of reasons and a hearing upon nonrenewal; however, like Wisconsin, Eastern Kentucky University's tenure system creates what amounts to a property interest in employment, the deprivation of which must conform to much stricter constitutional safeguards.

This case was tried after the decision in the *Roth* case, *supra,* and in conformity therewith. As in *Roth, supra,* Petitioner's property interest in employment was created and defined by the terms of her appointment. The contract provided that her employment was for one year beginning September 1969, and ending in June, 1970; it did not provide for renewal absent "sufficient cause."

The Eighth Circuit Court of Appeals in a similar case, *Ahern* v. *Board of Education of the School District of Grand Island* (C.A. 8th), 456 F. 2d 399 (1972), held that a teacher who shifted to students many decisions customarily made by teachers—such as choice of subject for daily discussion and course material—was properly discharged. The court held, "Simply stated, our conclusion is that Miss Ahern was invested by the Constitution with no right either (1) to persist in a course of teaching behavior which contravened the valid dictates of her employers, the public school board, regarding classroom method, or (2) as phrased by the District Court, 'to teach politics in economics.' "

"Reasons for non-renewal are subtle and at best difficult to articulate and a professor's value depends upon creativity, rapport with students and colleagues, and various other intangible qualities which cannot be measured by objective standards." *Lewis* v. *Chicago State College*, 299 F. Supp. 1357, 1359. The American Association of University Professors in its 1954 Policy stated:

> "* * * Our purpose is to permit the institution, within the limits of academic freedom, the utmost latitude in determining who will be retained for tenure appointments. Becuase the granting of tenure is tantamount to a lifetime commitment, we feel that the institution should be left without a reasonable doubt as to the faculty member's qualifications for tenure before it reaches a favorable decision." (AAUP Bulletin, Spring 1964, p. 85.)

Petitioner, on page 10 of her Petition for a Writ of Certiorari makes the statement, "It must be emphasized again that what is involved here is the meaning of academic freedom at the university level, not at a secondary or elementary school, where perhaps some restraints might be justified because of the relative youth of the students and the difference in function between these schools and universities." Respondents acknowledge some difficulty in comprehending the "difference in function" to which Petitioner refers. They believe it is the prerogative of each university to decide exactly what function it is serving and how best to serve it. Obviously, a regional state university, such as Eastern

Kentucky University, does not serve the same functions as do some of the Nation's largest universities or some of the more prestigous private universities. Students at most regional public universities are at a stage of educational development at which basic courses are needed in addition to courses designed primarily to promote free thinking. The question then becomes, who should make the decision on how best to serve the students—the courts or the universities? Respondents believe such decisions are best made at the university level; otherwise, in each case involving a nonrenewed teacher, the courts will have to review the school's whole academic program.

The question presented, in the University's opinion, is one the Legislature intended to leave to the discretion of the Board of Regents, which is advised by professional educators, and which, by virtue of its familiarity with the institution and the region which it serves, is in a better position to exercise such discretion than the courts. Universities should not be required to staff their faculties with teachers who do not conform to the reasonable requirements of the employer and who do not function as a part of a team striving for the achievement of certain academic goals.

The record in this case does not corroborate Petitioner's contention that an intellectual straitjacket was placed on Petitioner. It does demonstrate that the majority of students at Eastern Kentucky University need basic courses in Freshman English which stress fundamentals. Petitioner's philosophy of teaching students to think for themselves has very little use

(English-wise) in teaching students to construct a proper sentence, paragraph, or even write a decent theme free of grammatical errors. Although no evidence was presented on this issue, Petitioner's theories may be acceptable at some other university; however, Eastern Kentucky University did not think Petitioner was best serving its students. The District Court and Sixth Circuit Court of Appeals felt that conclusion was the rightful prerogative of the University.

This Court has recognized many First Amendment Rights for teachers, the consideration of which is constitutionally impermissible in deciding renewal or nonrenewal of public teachers' contracts. Respondents do not question the holdings in such cases. This court has also recognized that in the absence of constitutional infringement, public employment can be terminated at the will of the employer, *Cafeteria and Restaurant Workers Union, Local 473* v. *McElroy,* 367 U. S. 886 (1961). A state may prescribe a curriculum for its public schools, and "judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. * * * Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of the school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas,* 393 U. S. 97, 104, 89 S. Ct. 266, 21 L. Ed. 228 (1969).

## CONCLUSION

For the foregoing reasons the best interest of Higher Education will be furthered by denial of the Petition for a Writ of Certiorari.

Respectfully submitted,

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October, 1973